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IN THE

Supreme Court of the United States

October Term, 1960

No. [redacted]

JAMES A. FOX and ALBERT R. SAMPSON,

Petitioners,

—v.—

STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

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No. .....

JAMES A. FOX and ALBERT R. SAMPSON,

Petitioners,

—v.—

STATE OF NORTH CAROLINA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above-entitled cause on January 20, 1961.

Citations to Opinions Below

The opinion of the Supreme Court of North Carolina is reported at 118 S. E. 2d 58 and is set forth in the appendix attached hereto *infra*, p. 1a. The opinion of the Supreme Court of North Carolina in *State* v. *Avent*, 118 S. E. 2d 47, relied upon in the opinion in this case is also attached in the appendix, *infra*, p. 5a.

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on February 3, 1961 (R. Clerk's Certificate, *infra*, App., p. 4a).[1] The jurisdiction of this Court is

[1] The Clerk's certificate recites that final judgment was entered on February 3, 1961. The record, however, contains no actual form

invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and claiming here a denial of their rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Question Presented

1. Whether the due process and equal protection clauses of the Fourteenth Amendment suffer the state to use its executive and judicial authority to enforce racial discrimination in a business that has for profit opened its property to the general public while using the state criminal trespass statute to enforce racial discrimination within the same property.

2. Whether, where the criminal statute applied to convict petitioners gave no fair and effective warning that their actions were prohibited, and their conduct violated no standard required by the plain language of the law, the conviction offends the due process clause of the Fourteenth Amendment.

3. Whether the decision below conflicts with decisions of this Court securing the Fourteenth Amendment right to liberty of expression.

Statutory and Constitutional Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

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of judgment. Upon inquiry to the Clerk he informed counsel for petitioners that the judgment is a paper prepared by the Clerk. Because stay of execution was obtained before he prepared this paper he did not actually complete it and place it in the record.

2. This case also involves North Carolina General Statutes, §14-134:

> Trespass on land after being forbidden. "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars or imprisoned not more than thirty days."

Statement

This is one of 2 cases filed here today (the other is *State* v. *Avent*, No. 654, Supreme Court of North Carolina, Fall Term, 1960 reported at 118 S. E. 2d 47) which involve the question of whether a state may use its criminal trespass statute to enforce racial segregation according to the customs of the community in one portion of a commercial establishment otherwise open to the public without segregation. The issues are similar to those presented by *Garner*, *Briscoe*, and *Hoston* v. *State of Louisiana*, Nos. 617, 618 and 619 respectively, certiorari granted March 20, 1961, in which a state employed a statute forbidding disturbing the peace for this purpose.

March 21, 1960, petitioners, two Negro students from Shaw University, Raleigh, North Carolina (R. 80, 85), who were engaged in a student protest movement against racial discrimination and had been picketing the McCrory-McLellan Store in Raleigh (R. 80), bought various articles in the store (R. 81, 85) at counters where there was no racial discrimination, and then seated themselves at the lunch counter to request service (R. 81, 86). Petitioner Sampson ordered a cup of coffee (R. 83); petitioner Fox had intended to order coffee, but did not, as the waitress refused to serve Sampson because of his race (R. 83, 88).

Stools were vacant at the counter; food was on display (R. 87). No disturbance occurred (R. 51). Petitioners were well dressed and not at all offensive (R. 55). None of the luncheon patrons stopped eating while petitioners were there (R. 83). A white lady, a patron at the counter at the time, expressed sympathy with them (R. 83).

The McCrory-McLellan Store in Raleigh observed the custom of not serving Negroes at this counter. Most restaurants in Raleigh exclude Negroes (R. 60); no eating establishment in Raleigh served Negroes and whites together (R. 58).

A sign at the lunch counter entrance stated "No Trespassing" (R. 50); another announced "Employees and Guest[s] Only." But at the store's entrance there was no sign (R. 82). The store was serving a normal menu that day and had the various typical implements for lunch counter dining; seats were available. But the manager said he had "no facilities" for serving Negroes (R. 53). While he did not know what other facilities would be necessary, he did not have them (R. 54).

The McCrory-McLellan Store was open to the general public and extended an invitation to it to shop and do business (R. 55). This included Negroes, and included the defendants (R. 56). The manager said that as far as the lunch counter was concerned, any white person who might consider himself a guest was one, but this was not true for Negroes (R. 56).

The manager requested petitioners to leave (R. 86); one replied they felt they were guests because they had made purchases and received receipts (R. 86) and they declined to leave. Thereupon the manager called the police who promptly arrived (R. 86).

The police officer told the manager to ask petitioners to leave (R. 58) and when they did not the officer himself asked them to leave (R. 58). The manager did not request the police to arrest petitioners. The officer arrested them on his own volition in the line of duty (R. 60). This was the first time he had ever arrested a well behaved person in a restaurant; he had never "been called to arrest a white person under conditions like that"; although he had arrested persons who were drunk and so disturbing a restaurant that it was unable to operate (R. 60, 61).

The warrants (R. 2, 5) signed and sworn by the officer stated that he was informed that each petitioner unlawfully and willfully entered:

> "upon the premises of McCrory-McLellan Stores . . . having been forbidden to enter on said premises, . . . not having license to enter said premises; and that the said [petitioner] did remain in a portion of said premises set off from the balance of said store and clearly marked and partitioned from the rest of said store (after having been told to remove himself from that portion of said store by Claude M. Breeden, manager of said store) the said [petitioner] not having license to then be on said portion of said premises, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

Petitioners (after having raised constitutional defenses discussed *infra*, p. 6), were convicted in the City Court of Raleigh (R. 3, 6) and appealed to Wake Superior Court for a trial *de novo*. There they pleaded not guilty (R. 26) and after a trial at which various constitutional defenses were made (discussed *infra*, p. 8) were found guilty again (R. 28).

On April 22, 1960 both petitioners were sentenced to the common jail of Wake County for thirty days, the sentence being suspended upon payment of $25.00 fine and costs and that they "remain of good behavior" and violate no laws (R. 28).

Petitioners noticed an appeal in open court, and thereupon on April 26, 1960 the court vacated its prior judgment and the appeal entry, and imposed a sentence of thirty days imprisonment, without suspending sentence (R. 29). Petitioners again noticed an appeal to the Supreme Court of North Carolina (R. 29).

The Supreme Court of North Carolina affirmed on February 3, 1961 (Clerk's Certificate at close of Opinion; App. p. 4a).

How the Federal Questions Were Presented and Decided

In Wake Superior Court petitioners moved for judgment as of nonsuit[2] (R. 30-47), alleging that they were peacefully upon the premises of the McCrory-McLellan Store as invitees, customers and guests, making the use of the premises which they and all members of the buying public were invited to make; that they were only upon the portions of the premises where variety retail and lunch counter business was conducted, not any place reserved exclusively for management or employees; that members of the buying public were freely admitted to make purchases and inquiries; that at all times they were exercising constitutional rights and privileges of requesting that the McCrory-

[2] Petitioners also had moved for judgment as of nonsuit in the City Court (R. 8-25). Said motions raised the same points as those later presented in the Superior Court, but as the proceedings in the Superior Court were a trial *de novo*, petitioners set forth here only the grounds of the motion there.

McLellan Store extend to them all of the privileges and accommodations extended to other invitees and guests; that petitioners, when arrested, were peacefully engaged in a movement with other Negro students to persuade retail businesses to desist from racial discrimination in lunch counter service; that when arrested petitioners were seated at the lunch counter when service was extended to other customers, but the manager refused to honor their request for service only because of race, and asked them to leave solely because of race; that petitioners were ready, willing and able to perform the contractual undertakings which they proposed; that the prosecution was procured to harass, delay and discourage their efforts to cause McCrory-McLellan Stores to cease lunch counter discrimination; that the prosecution was initiated to obstruct defendants in their effort to protest this discrimination; that the prosecution was an attempt by the McCrory-McLellan Stores and the Raleigh police to enlist the aid of the court to sanction lunch counter racial discrimination; that the prosecution was an effort by the management and police to enlist the aid of the court to interfere with defendants' exercise of fundamental rights to seek, make, and enjoy contractual relationships. Petitioners moved for judgment as of nonsuit based upon the privileges and immunities, equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution on the ground that they were arrested for exercising federal rights of freedom of speech and protest in a place where they had been invited along with the buying public; that the Court was being asked by the prosecuting witness and the police to judicially sanction the racially discriminatory policies of the McCrory-McLellan Stores; that the statute under which they were charged denied due process of law, equal protection, and privileges and immunities of the Fourteenth Amendment to the United States Constitution in that it

denied to them the right to be in and about a public market place for the purpose of exercising in a peaceful manner fundamental rights of speech and protest; that they were denied rights secured by the privileges and immunities and due process clauses of the Fourteenth Amendment to the United States Constitution to enter into contractual relationships; that in view of the nature of petitioners' entry upon said premises the application of said statute to them and to their request for lunch counter service was contrary to privileges and immunities, and due process clauses of the Fourteenth Amendment to the United States Constitution in that the action of the state herein was invalid under this Court's decision in *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; that petitioners were orderly and well-behaved customers in the McCrory-McLellan Stores and application of the statute to them was arbitrary, capricious and oppressive rendering the statute vague and uncertain contrary to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The motions for judgment as of nonsuit were denied and excepted to (R. 27).

Petitioners pleaded not guilty (R. 28).

Following the state's case each defendant once more moved the court for judgment as of nonsuit (R. 62-79). These motions reiterated the contentions of the earlier motions for nonsuit. They were overruled and exception was taken (R. 80).

Following the close of the petitioners' case motions for judgment as of nonsuit once more were renewed and were once more denied by the Court. Exception was taken thereto (R. 88).

Petitioners were found guilty (R. 88). In support of motions to set aside the verdicts they once more offered their motions for judgment as of nonsuit which were denied and exception taken thereto (R. 89).

As assignments of error petitioners specifically raised the questions presented in the motions for judgment as of nonsuit and assigned that these motions were erroneously denied (R. 90-94).

The Supreme Court of North Carolina in a brief opinion which cited and incorporated by reference its decision in *State* v. *Avent* (which is being brought here this day on petition for writ of certiorari) passed upon the federal constitutional questions. It held that:

> "Defendants contend a merchant who sells his wares to one must serve all, and a refusal to do so is a violation of the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The contention lacks merit. The operator of a private mercantile establishment has a right to select his customers, serve those he selects, and refuse to serve others. The reasons which prompt him to choose do not circumscribe his right. This was decided after careful consideration in S. v. Avent et al., *ante*. Nothing need be added to what was there said.
>
> "The reasons given for affirming the judgment in S. v. Avent, *supra*, likewise demonstrate the inapplicability of Art. I, sec. 17 of the Constitution of North Carolina. Its guarantee against imprisonment except by the law of the land was not intended to protect trespassers from prosecution or to prohibit a private property owner from selecting his guests or customers.
>
> "Since defendants had no constitutional right to remain on private property over the protest of the lawful occupant, it follows that the refusal to leave when requested was a violation of the statute" (App. pp. 2a-3a).

The *Avent* opinion which was incorporated by reference held:

> "All of the assignments of error by the defendants have been considered, and all are overruled. Defendants have not shown the violation of any of their rights, or of the rights of any one of them, as guaranteed by the 14th Amendment to the Federal Constitution, and by Article I, §17, of the North Carolina Constitution" (App. p. 25a).

In explication it held that:

> "In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law" (App. p. 11a).

Moreover, the opinion held that:

> "'The right of property is a fundamental natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, . . . property.' 11 Am. Jur., Constitutional Law, §335." (App. p. 15a).

To the argument that the action taken below constitutes state action contrary to the due process and equal protection clauses of the Fourteenth Amendment, the Court held:

> "Defendants misconceive the purpose of the judicial process here. It is to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, *even though it enforces the clear legal right of racial discrimination of the owner.*" (Emphasis supplied.) (App. p. 16a).

Moreover, no freedom of speech and assembly were denied, the Court held:

> "No one questions the exercise of these rights by the defendants, if exercised at a proper place and hour. However, it is not an absolute right." (App. p. 20a).

Reasons for Granting the Writ

This case involves substantial questions affecting important constitutional rights, resolved by the court below in conflict with principles expressed by this Court.

I.

The State of North Carolina has enforced racial discrimination contrary to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

Petitioners seek certiorari to the Supreme Court of North Carolina, having unsuccessfully contended below that their conviction constitutes state enforcement of racial discrimination contrary to the equal protection and due process clauses of the Fourteenth Amendment. In rejecting petitioners' claim, the court below referred to its opinion in *State* v. *Avent*, 118 S. E. 2d 47, saying that "nothing need be added to what was said there" (App. p. 2a). In *Avent*, the court held that ". . . the purpose of the judicial process" was ". . . to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, even though it enforced the clear legal right of racial discrimination of the owner" (Opinion, *Avent*, App. p. 16a). Answering the claim that this was state action prohibited by the Fourteenth Amendment, the court below replied that the right of property is "fundamental, natural, inherent and inalienable," being "not ex gratia from the legislature, but ex debito from the Constitution" (App. p. 15a); that the right could be characterized as "sacred"; and that the North Carolina trespass laws were "color blind," their sole purpose being to protect property from trespassers (*Id.*). The Court held that the police and judicial action in arresting and convicting petitioners "cannot fairly be said to be state action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution" (App. p. 17a).

But from the officer's orders to depart to the final judgment of the highest state court, this has been the state's cause. Judicial acts of state courts are "state action" under the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1.[3] Equally clear, the Amendment reaches conduct of the police. Cf. *Monroe* v. *Pape*, —— U. S. ——, 5 L. ed. 2d 492 (1961); *Screws* v. *United States*, 325 U. S. 91. See also *Baldwin* v. *Morgan*, —— F. 2d —— (5th Cir. No. 18280, decided Feb. 17, 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533, note 1 (5th Cir. 1960); *Valle* v. *Stengel*, 176 F. 2d 697 (3rd Cir. 1949), all of which condemn police enforcement of racial segregation in public places.

State action which enforces racial discrimination and segregation is condemned by the Fourteenth Amendment's equal protection clause. *Buchanan* v. *Warley*, 245 U. S. 60; *Brown* v. *Board of Education*, 347 U. S. 483; *Shelley* v. *Kraemer*, *supra*; *Gayle* v. *Browder*, 352 U. S. 903. Moreover, state inflicted racial discriminations, bearing no rational relation to a permissible governmental purpose, offend the concept of due process. *Bolling* v. *Sharpe*, 347 U. S. 497; *Cooper* v. *Aaron*, 358 U. S. 1. Cf. *Burton* v.

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[3] The subject of judicial action as "state action" is treated exhaustively in Part II of Chief Justice Vinson's opinion which concludes:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." (*Id.* at 18.)

In addition to the many cases cited in *Shelley*, *supra*, at 14-18, see also *Barrows* v. *Jackson*, 346 U. S. 249; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463.

Wilmington Parking Authority, 29 U. S. Law Week 4317, terming exclusion of a Negro as offensive in a restaurant and his acceptance in other parts of the same building "irony amounting to grave injustice." For the state to infect the administration of its criminal laws by using them to support lunch counter segregation as an aspect of the "customs" of a segregated society, offends the salutary principle that criminal justice must be administered "without reference to consideration based upon race." *Gibson v. Mississippi*, 162 U. S. 565, 591.

Indeed, when the Supreme Court of North Carolina held that the state judicial process "enforces the clear, legal right of racial discrimination of the owner" (App. p. 16a), it "construed this legislative enactment as authorizing discriminatory classification based exclusively on color." Cf. Mr. Justice Stewart, concurring in *Burton v. Wilmington Parking Authority*, 29 U. S. Law Week 4317, 4320. And, as Mr. Justice Frankfurter wrote, dissenting in the *Burton* case, "for a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment." (*Ibid.*)

The Fourteenth Amendment from the beginning has reached and prohibited all racial discrimination save that "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings," and that which is "not sanctioned in some way by the State," *Civil Rights Cases*, 109 U. S. 3, 17. "State action of every kind . . . which denies . . . the equal protection of the laws" is prohibited by the Amendment. *Id.* at 11; cf. *Burton v. Wilmington Parking Authority, supra.* The Fourteenth Amendment was "primarily designed" to protect Negroes against racial discrimination. *Strauder v. West Virginia*, 100 U. S. 303, 307. "The words of the Amendment, it is

true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from . . . legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy. . . ." (*Ibid.*)

The fact that a property interest is involved does not imply a contrary result. It is the state's power to enforce such interests that are in issue. For, as the Court said in *Shelley* v. *Kraemer*, 334 U. S. 1, 22:

> ". . . It would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 326 U. S. 501."

Indeed, as the Court said in *Marsh* v. *Alabama*, 326 U. S. 501, 505-506:

> "We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

Here, certainly, is the case of "an owner, [who] for his advantage, opens up his property for use by the public in general."

Petitioners contend that the states may not, under the Fourteenth Amendment, use their police[4] and judiciary to enforce racial discrimination for a business open to the general public. Analyzing the totality of circumstances, with regard for the nature of the property interests asserted, and the state's participation in their creation and enforcement no property interest of such an enterprise warrants departing from the Fourteenth Amendment's clear stricture against racial discrimination. As this Court said recently in *Burton* v. *Wilmington Parking Authority*, 29 U. S. Law Week 4317, 4318 (April 17, 1961):

> "Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is 'an impossible task' which 'this Court has never attempted.' *Kotch* v. *Pilot Comm'rs*, 330 U. S. 552, 556. Only by sifting facts and weighing circumstances can the nonobvious

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[4] The arresting officer testified:

> "Relative to the arrest, my superiors had not ordered me to arrest any person under such conditions. It was my own voluntary act in the line of my duty . . . I have never had an opportunity nor have I been called to arrest a white person under conditions like that. I have had occasion to get some out that were drunk and causing disturbance. The man couldn't operate his business.
>
> "I had never been called to arrest a person that was perfectly orderly in every respect like any other citizen . . ." (R. 60-61.)

involvement of the State in private conduct be attributed its true significance."

What is the "property right" involved here? McCrory-McLellen Stores Corporation did business in a commercial building opened to the public as a whole for the business advantage of the owner. There was no practice of selecting customers or limiting the classes of persons who may enter. The store was not, as some may be, limited to men, women, adults, white persons or Negroes. Negroes were accommodated throughout the building except the lunch counter (R. 56-57). No claim or interest in privacy was exercised by the owner in the customary use of this building.

The specific area in dispute, the lunch counter, was an integral part of this single commercial establishment, and like the entire premises was open to the public to do business for profit. It was not severed for the owner's private use, nor was it like a stockroom, employees' working area, or a living space connected to a store.

There is no issue concerning protection of property from use alien to its normal intended function. Petitioners sought only to purchase food. Whatever their motives (a frankly acknowledged desire to seek an end to racial discrimination), their actions conformed to those of ordinary purchasers of food.[5] Petitioners were not disorderly or offensive (R. 55). The manager's sole objection was that some of them were Negroes and the others accompanied Negroes. The sole basis of exclusion, ejection, arrest and conviction was race. The crime was being Negroes at a white only lunch counter.

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[5] "At the time the students came into the store they sat down in order as other persons might do. That is the usual procedure when you are ready to order from the lunch counter. You come in and sit down" (Testimony of store manager, R. 55).

Moreover, the manager testified that the lunch counter was segregated "to follow local custom" and "since no one else in Raleigh serves colored and white together" (R. 58). Obviously then, the asserted right here is related to participation in, or conformity with, a community custom of segregation, the maintenance of a segregated society.

Therefore, the asserted "property" right was simply the right to discriminate solely on the basis of race, and according to the customs of the community, in one integral part of a single commercial building open to the general public against persons otherwise welcome in all other parts of the premises.[6] This, indeed, may be called a "property right" but as thus revealed, it is far from the "sacred," "natural, inherent and inalienable" property right (App. p. 15a) which the generalized language of the court below held to be at stake. For as Mr. Justice Holmes wrote, dissenting in *Lochner* v. *New York*, 198 U. S. 45, 76, "[g]eneral propositions do not decide concrete cases."

This "property interest" hardly need be protected in order for our form of constitutional government to survive (See App. 17a, 18a-19a). Obviously, for example, this type of "property interest" may be taken away by the states without denying due process of law.[7] Indeed, mere reference to the common law duty of common carriers and innkeepers demonstrates that an owner's use of his property affects the nature of his dominion over it. Cf. *Civil Rights*

[6] "This is an invitation extended from me to the general public to shop and do business with my store. If the defendants Sampson and Fox want to come in and be customers it includes them" (Manager's testimony, R. 56).

[7] See for example, *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359; cf. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100.

Cases, 109 U. S. 3, 25. This Court has said on several occasions, "that dominion over property springing from ownership is not absolute and unqualified." *Buchanan* v. *Warley*, 245 U. S. 60, 74; *United States* v. *Willow River Power Co.*, 324 U. S. 499, 510; *Marsh* v. *Alabama*, 326 U. S. 501, 506; *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 417 (Justice Brandeis's dissenting opinion). See *Munn* v. *Illinois*, 94 U. S. 113; 5 Powell on Real Property 493 *et seq.* (1956).

This case does not involve a claim that the state must affirmatively provide a legal remedy against "private" racial discrimination. (Cf. *Burton* v. *Wilmington Parking Authority*, 29 U. S. Law Week 4317, April 17, 1961). Rather, petitioners assert only their immunity from criminal prosecution. Nor is there involved judicial enforcement of racial discrimination by trespass laws to protect an owner's interest in maintaining privacy in the use of his property, such as a home or private club. Countervailing considerations that may be involved when a state acts to protect its citizens' interest in their privacy, are not present. There is no issue as to whether state trespass laws may be used to enforce an exclusion for no reason. Finally, there is no claim that the Fourteenth Amendment bars enforcement of trespass laws generally.

Consequently, the case involves only this highly important issue: Whether the state may use its executive and judicial machinery (particularly its criminal laws) to enforce racial discrimination for a business company that by its own choice and for its own advantage has opened its commercial property to the public. Petitioners submit that prior decisions of this Court demonstrate this question should be answered No.

This case merits plenary review in this Court because of the substantial public importance of the questions relating to the extent to which a state may use its criminal

laws to enforce racial segregation. As indicated to the Court in petitions for certiorari filed and granted in *Garner, Briscoe,* and *Hoston* v. *State of Louisiana,* Nos. 617, 618 and 619, October Term 1960, this problem is one which has arisen in many different communities and many state courts since the spring of 1960. See, Pollitt, "Dime Store Demonstrations: Events and Legal Problems of the First Sixty Days," 1960 Duke Law Journal 315. Review of this case will facilitate the proper disposition of many similar criminal prosecutions.

II.

The criminal statute applied to convict petitioners gave no fair and effective warning that their actions were prohibited; petitioners' conduct violated no standard required by plain reading of the law; thereby their conviction offends the due process clause of the Fourteenth Amendment and conflicts with principles announced by this Court.

Petitioners were convicted under North Carolina General Statutes, §14-134, which provides:

> If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days.

Although the statute in terms prohibits only going on the land of another *after* being forbidden to do so, the Supreme Court of North Carolina has now construed the statute to prohibit also remaining on property when directed to leave following lawful entry. (See *Avent* Opinion below, App. p. 16a). Stated another way, the

statute now is applied as if "remain" were substituted for "enter." Expansive judicial interpretation of the statute began by a statement in *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295 (1958) (a case in which defendants deliberately ignored racial signs posted outside an ice cream parlor and also refused to leave upon demand),[8] 92 years after enactment of the law.[9] The *Avent* case is the first unambiguous holding under §14-134 which convicts defendants who went upon property with permission and merely refused to leave when directed.

By the manager's own testimony petitioners were welcome as customers in the store—apart from the lunch counter (See R. 55-56). Whatever petitioners' knowledge of the store's racial policy as it had been practiced, there was no suggestion that they had ever been forbidden to go to the lunch counter and request service. The conclusory statement that defendants "entered" (trespassed) "after having been forbidden to do so," was simply a holding that defendants' acts in failing to leave when directed violated the statute.

Absent the special expansive interpretation given §14-134 by the North Carolina Supreme Court the case would plainly fall within the principle of *Thompson* v. *City of Louisville*, 362 U. S. 199, and would be a denial of due process of law as a conviction resting upon no evidence of guilt. There was obviously no evidence that petitioners

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[8] In the *Clyburn* opinion, and here, the State court explained construction of §14-134 by reference to analogous construction of a statute prohibiting forcible entry and detainer (N. C. Gen. Stat. §14-126), which had been construed to apply to peaceful entry followed by forcible opposition to a later demand to leave. The Court held that "entry" was synonymous with "trespass" in both statutes (14-126 and 14-134). (14-134 does not use the word "entry"; it states "go or enter upon".)

The facts of the *Clyburn* case are summarized in the Court's opinion below in *Avent*, App. p. 12a.

[9] The Statute was first enacted in 1866. North Carolina Laws, Special Session, Jan., 1866, c. 60.

entered the premises "after having been forbidden to do so," and the conclusion that they did rests solely upon the special construction of the law.

Under familiar principles the construction given a state's statute by its highest court determines its meaning. However, petitioners submit that this statute has been so judicially expanded that it does not give a fair and effective warning of what it now prohibits. Rather, by expansive interpretation the statute now reaches more than its words fairly and effectively define and as applied it therefore offends the principle that criminal laws must give fair and effective notice of the acts they prohibit.

The due process clause of the Fourteenth Amendment requires that criminal statutes be sufficiently explicit to inform those who are subject to them what conduct on their part will render them criminally liable. "All are entitled to be informed as to what the State commands or forbids," *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, and cases cited therein in note 2.

Construing and applying federal statutes this Court has long adhered to the principle expressed in *Pierce* v. *United States*, 314 U. S. 306, 311 that:

> . . . judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. Lanzetta v. New Jersey, 306 U. S. 451, and cases cited.

In *Pierce, supra*, the Court held a statute forbidding false personation of an officer or employee of the United States inapplicable to one who had impersonated an officer of the T. V. A. Similarly in *United States* v. *Cardiff*, 344 U. S. 174, this Court held too vague for judicial enforcement a criminal provision of the Federal Food, Drug, and Cos-

metic Act which made criminal a refusal to permit entry or inspection of business premises "as authorized by" another provision which, in turn, authorized certain officers to enter and inspect "after first making request and obtaining permission of the owner." The Court said in *Cardiff*, at 344 U. S. 174, 176-177:

> The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. United States v. L. *Cohen Grocery Co.*, 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. Herndon v. Lowry, 301 U. S. 242.

The Court applied similar principles in *McBoyle* v. *United States*, 283 U. S. 25, 27; *United States* v. *Weitzel*, 246 U. S. 533, 543, and *United States* v. *Wiltberger*, 18 U. S. (5 Wheat.) 76, 96. Through these cases runs a uniform application of the rule expressed by Chief Justice Marshall:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated (Id. 18 U. S. (5 Wheat.) at 96).

The cases discussed above involved federal statutes concerning which this Court applied a rule of construction closely akin to the constitutionally required rule of fair

and effective notice. This relationship indeed is indicated by the reference to cases decided on constitutional grounds. The *Pierce* opinion cited for comparison *Lanzetta* v. *New Jersey*, *supra*, and "cases cited therein," while *Cardiff*, *supra*, mentions *United States* v. *L. Cohen Grocery Co.*, *supra*, and *Herndon* v. *Lowry*, *supra*.

On its face the North Carolina trespass statute warns against a single well-defined act, *e.g.*, going or entering upon the land of another "after" being forbidden to do so. "After" connotes a sequence of events which by definition excludes going on or entering property "before" being forbidden. The sense of the statute in normal usage negates its applicability to petitioners' act of going on the premises with permission, despite a later failure to leave when directed.

But by judicial interpretation "enter" was held synonymous with "trespass," and, indeed, also with "remain." Here a legislative *casus omissus* was corrected by the court. But as Mr. Justice Brandeis observed in *United States* v. *Weitzel*, *supra*, 543, a *casus omissus* while not unusual, and often undiscovered until much time has elapsed, does not justify extension of criminal laws by reference to legislative intent.

Moreover, that the indictments specified both that petitioners had entered after having been forbidden and also that they refused to leave after being ordered to do so, does not correct the unfairness inherent in the statute's failure specifically to define a refusal to leave as in offense. As this Court said in *Lanzetta* v. *New Jersey*, *supra*:

> It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U. S. 359, 368; Lovell v. Griffin, 303 U. S. 444.

Petitioners do not contend for an unreasonable degree of specificity in legislative drafting. Some state trespass laws have specifically recognized as distinct prohibited acts the act of going upon property after being forbidden and the act of remaining when directed to leave.[10]

Converting by judicial construction the common English word "enter" into a word of art meaning "trespass" or "remain," has transformed the statute from one which fairly warns against one act into a law which fails to apprise those subject to it "in language that the common word will understand, of what the law intends to do if a certain line is passed" (*McBoyle* v. *United States*, 283 U. S. 27). Nor does common law usage of the word "enter" support the proposition that it is synonymous with "trespass" or "remaining." While "enter" in the sense of going on and taking possession of land is familiar (Ballantine, "Law Dictionary", (2d Ed. 1948) 436; "Black's Law Dictionary", (4th Ed. 1951) 625), its use to mean remaining on land when ordered off is novel. If "enter" is synonymous with "trespass," it only became so in North Carolina.

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[10] See for example the following state statutes which do effectively differentiate between "entry" after being forbidden and "remaining" after being forbidden. The wordings of the statutes vary but all of them effectively distinguish the situation where a person has gone on property after being forbidden to do so, and the situation where a person is already on property and refuses to depart after being directed to do so, and provide separately for both situations: Code of Ala., Title 14, §426; Compiled Laws of Alaska Ann. 1958, Cum. Supp. Vol. III, §65-5-112; Arkansas Code, §71-1803; Gen. Stat. of Conn. (1958 Rev.), §53-103; D. C. Code §22-3102 (Supp. VII, 1956); Florida Code, §821.01; Rev. Code of Hawaii, §312-1; Illinois Code, §38-565; Indiana Code, §10-4506; Mass. Code Ann. C. 266, §120; Michigan Statutes Ann. 1954, Vol. 25, §28.80(1); Minnesota Statutes Ann. 1947, Vol. 40, §621.57; Mississippi Code §2411; Nevada Code, §207.200; Ohio Code, §2909.21 Oregon Code, §164.460; Code of Virginia, 1960 Replacement Volume, §18.1-173; Wyoming Code, §6-226.

Judicial construction often has cured vague criminal statutes from the vice of vagueness, but this has been construction which confines, not expands, statutory language. Compare *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 with *Herndon* v. *Lowry*, 301 U. S. 242.

As construed and applied, the law in question no longer informs one what is forbidden in fair terms and no longer effectively warns against transgression. This failure offends the standard of fairness expressed by the rule against expansive construction of criminal laws, and embodied in the due process clause of the Fourteenth Amendment.

III.

The decision below conflicts with decisions of this Court securing the Fourteenth Amendment right to freedom of expression.

Petitioners were engaged in the exercise of free expression by means of verbal requests to the management and the requests implicit in seating themselves at the counter for nonsegregated lunch counter service. Their expression (asking for service) was entirely appropriate to the time and place in which it occurred. ". . . they sat down in order as other persons might do. That is the usual procedure when you are ready to order from the lunch counter. You come in and sit down" (R. 55). Certainly the invitation to enter an establishment carries with it the right to discuss and even argue with the proprietor concerning terms and conditions of service so long as no disorder or obstruction of business occurs.

Petitioners did not shout, obstruct business, carry picketing signs, give out handbills, or engage in any conduct inappropriate to the time, place and circumstances. And, as is fully elaborated above in Part I of this petition, there

was no invasion of privacy involved in this case, since the lunch counter was an integral part of commercial property open up to the public.

This Court and other courts on numerous occasions have held that the right of free speech is not circumscribed by the mere fact that it occurs on private property. The existence of a property interest is but one circumstance to be considered among many. In *Marsh* v. *Alabama*, *supra*, for example, this Court overturned the trespass conviction of Jehovah's Witnesses who went upon the premises of a company town to proselytize holding that such arrest and conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, the Court upheld the validity of the National Labor Relations Board's ruling that lacking special circumstances that might make such rules necessary, employer regulations forbidding all union solicitation on company property regardless of whether the workers were on their own or company time, constituted unfair labor practices.[11]

In *Martin* v. *Struthers*, 319 U. S. 141, this Court held unconstitutional an ordinance which made unlawful ringing doorbells of residences for the purpose of distributing handbills, upon considering the free speech values involved—"[d]oor to door distribution of circulars is essential to the poorly financed causes of little people," at p. 146

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[11] See also *N. L. R. B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir., 1945); *United Steelworkers* v. *N. L. R. B.*, 243 F. 2d 593, 598 (D. C. Cir., 1956) (reversed on other grounds) 357 U. S. 357. ("Our attention has not been called to any case under the Wagner Act or its successor in which it has been held that an employer can prohibit either solicitation or distribution of literature by employees simply because the premises are company property. Employees are lawfully within the plant, and nonworking time is their own time. If Section 7 activities are to be prohibited, something more than mere ownership and control must be shown.")

Compare *N. L. R. B.* v. *Fansteel Metal Corp.*, 306 U.S. 240, 252 (employees seized plant; discharge held valid; "high-handed proceeding without shadow of legal right").

—and that the ordinance precluded individual private householders from deciding whether they desired to receive the message. But effecting "an adjustment of constitutional rights in the light of the particular living conditions of the time and place", in *Breard* v. *Alexandria*, 341 U. S. 622, 626, the Court, assessing a conviction for door-to-door commercial solicitation of magazines, contrary to a "Green River" ordinance, concluded that the community "speak[ing] for the citizens," 341 U. S. 644, might convict for crime in the nature of trespass after balancing the "conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results." 341 U. S. at 644. Because, among other things, "[s]ubscription may be made by anyone interested in receiving the magazines without the annoyances of house to house canvassing," *ibid.*, the judgment was affirmed.

Similarly, following an appraisal of the speech and property considerations involved, a Baltimore City Court, *State of Maryland* v. *Williams*, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959), has on Fourteenth Amendment and Labor Management Relations Act grounds, decided that pickets may patrol property within a privately owned shopping center. See also *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948), which held that picketing within Pennsylvania Station was not trespass: the owners opened it to public and their property rights were "circumscribed by the constitutional rights of those who use it"; *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959), which denied relief to a shopping center owner against picketers on his property, relying on the Fourteenth Amendment.

The liberty secured by the due process clause of the Fourteenth Amendment insofar as it protects free ex-

pression is not limited to verbal utterances, though petitioners here expressed themselves by speech. The right comprehends picketing, *Thornhill* v. *Alabama*, 310 U. S. 88; free distribution of handbills, *Martin* v. *Struthers*, 319 U. S. 141; display of motion pictures, *Burstyn* v. *Wilson*, 343 U. S. 495; joining of associations, *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; the display of a flag or symbol, *Stromberg* v. *California*, 283 U. S. 359. What has become known as a "sit in" is a different but obviously well understood symbol, a meaningful method of communication and protest.

In the circumstances of this case, the only apparent state interest being preserved was that of maintaining the management's rights to exclude Negroes from the lunch counter. The management itself sought nothing more. But as Justice Holmes held in *Schenck* v. *United States*, 249 U. S. 47, 52, the question is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil" that the state has a right to prevent.

The state has no interest in preserving such discrimination, and certainly has no valid interest in suppressing speech which is entirely appropriate to the time and place and does not interfere with privacy, when the speech urges an end to racial discrimination imposed in accordance with the customs of the community.

CONCLUSION

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

NORTH CAROLINA SUPREME COURT

Fall Term 1960

No. 442—Wake

STATE OF NORTH CAROLINA

—v.—

JAMES A. FOX
Docket No. 5477

and

ALBERT R. SAMPSON
Docket No. 5478

Appeals by defendants from Hooks, S. J., April Assigned Term 1960 of Wake.

Each defendant was tried in the Raleigh City Court on a warrant which charged that on 21 March 1960 the named defendant entered the premises of McCrory-McLellan Stores on Fayetteville Street in Raleigh and "did remain in a portion of said premises set off from the balance of said store and clearly marked and partitioned from the rest of said store (after having been told to remove himself from that portion of said store by Claude M. Breeden, manager of said store)." Each was found guilty. Fines were imposed. Each appealed to the Superior Court. There the cases were consolidated. Verdicts of guilty were returned, prison sentences imposed, suspended upon condition defendants pay a fine of $25, costs, and remain on good behavior. Defendants appealed.

Attorney General Bruton and Assistant Attorney General Moody for the State.

Samuel S. Mitchell, George R. Greene, F. J. Carnage, George E. Brown and Jack Greenberg for defendant appellants.

PER CURIAM. McCrory-McLellan Stores (called McLellan) operated a mercantile establishment on Fayetteville Street in Raleigh where it offered for sale to the public a general line of merchandise. In this store it set apart an area for lunch counter service. This area was enclosed by fence. McLellan pursued the policy of restricting its lunch counter service to its employees and its white patrons. This fact was known to defendants, who are Negroes. To test the right of an operator of a private mercantile establishment to select the customers he will serve in any particular portion of the store, defendants seated themselves at the lunch counter and demanded service. They did not want or expect service as they had eaten lunch a few minutes before entering the store. Despite repeated requests to leave the enclosed area, they remained and persisted in their demand for services until arrested by city police and charged with violating G.S. 14-134, the trespass statute.

Defendants contend a merchant who sells his wares to one must serve all, and a refusal to do so is a violation of the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States. The contention lacks merit. The operator of a private mercantile establishment has a right to select his customers, serve those he selects, and refuse to serve others. The reasons which prompt him to choose do not circumscribe his right. This was decided after careful consideration in *S.* v. *Avent, et al., ante.* Nothing need be added to what was there said.

The reasons given for affirming the judgment in *S.* v. *Avent, supra,* likewise demonstrate the inapplicability of Art. I, sec. 17 of the Constitution of North Carolina. Its guarantee against imprisonment except by the law of the land was not intended to protect trespassers from prosecution or to prohibit a private property owner from selecting his guests or customers.

Since defendants had no constitutional right to remain on private property over the protest of the lawful occupant, it follows that the refusal to leave when requested was a violation of the statute.

No Error

A TRUE COPY:

ADRIAN J. NEWTON
Clerk of Supreme Court of North Carolina

[Seal]

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF NORTH CAROLINA

—v.—

JAMES A. FOX
Docket No. 5477

and

ALBERT R. SAMPSON
Docket No. 5478

Appeal docketed	29 September 1960
Case argued	1 November 1960
Opinion filed	3 February 1961
Final judgment entered	3 February 1961

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 20th day of April, 1961.

ADRIAN J. NEWTON
Clerk of the Supreme Court

BY SARAH G. BARBEE
Deputy Clerk

Opinion by Mr. Justice Mallard

SUPREME COURT OF NORTH CAROLINA

Fall Term 1960

No. 654—Durham

STATE

—v.—

JOHN THOMAS AVENT

STATE

—v.—

LACY CARROLE STREETER

STATE

—v.—

FRANK MCGILL COLEMAN

STATE

—v.—

SHIRLEY MAE BROWN

STATE

—v.—

DONOVAN PHILLIPS

STATE

—v.—

CALLIS NAPOLIS BROWN

STATE

—v.—

JOAN HARRIS NELSON

Appeal by defendants from Mallard, *J.*, 30 June 1960 Criminal Term of Durham.

Seven criminal actions, based on seven separate indictments, which were consolidated and tried together.

The indictment in the case of defendant John Thomas Avent is as follows: "The Jurors for the State upon their oath present, That John Thomas Avent, late of the County of Durham, on the 6th day of May, in the year of our Lord one thousand nine hundred and sixty, with force and arms, at and in the county aforesaid, did unlawfully, willfully and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Company store located at 101-103 W. Main Street in Durham, N. C., said S. H. Kress and Company, owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Company, to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that he the said John Thomas Avent, defendant, had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The other six indictments are identical, except that each indictment names a different defendant.

The State's evidence tends to show the following facts:

On 6 May 1960 S. H. Kress and Company was operating a general variety store on Main Street in the city of Durham. Its manager, W. K. Boger, had complete control and authority over this store. The store has two selling floors

and three stockroom floors, and is operated to make a profit. On the first floor the store has a stand-up counter, where it serves food and drinks to Negroes and White people. The luncheonette department serving food is in the rear of the basement on the basement floor. On 6 May 1960 S. H. Kress and Company had iron railings, with chained entrances, separating the luncheonette department from other departments in the store, and had signs posted over that department stating the luncheonette department was operated for employees and invited guests only. Customers on that date in the luncheonette department were invited guests and employees.

On 6 May 1960 these seven defendants, five of whom are Negroes and two of whom (Joan Harris Nelson and Frank McGill Coleman) are members of the White race, were in the store. Before the seven defendants seated themselves in the luncheonette department, and after they seated themselves there, W. K. Boger had a conversation with each one of them. He told them that the luncheonette department was open for employees and invited guests only, and asked them not to take seats there. When they seated themselves there, he asked them to leave. They refused to leave until after they were served. He called an officer of the city police department. The officer asked them to leave. They did not do so, and he arrested them, and charged them with trespassing. The seven defendants were not employees of the store. They had no authority or permission to be in the luncheonette department.

On cross-examination W. K. Boger testified in substance: S. H. Kress and Company has 50 counters in the store, and it accepts patronage of Negroes at those 50 counters. White people are considered guests. Had the two White defendants come into the store on 4 May 1960, I would not have served them in the luncheonette department for the

reason they had made every effort to boycott the store. He would have served the White woman defendant, but he asked her to leave when she gave her food to a Negro. The object of operating our store in Durham is definitely to make a profit. It is the policy of our store to operate all counters dependent upon the customs of the community. It is our policy in Durham to refuse to serve Negroes at the luncheonette department downstairs in our seating arrangement. It is also our policy there to refuse to serve White people in the company of Negroes. We had signs all over the luncheonette department to the effect that it was open for employees and invited guests.

Captain Cannady of the Durham Police Department testified in substance: As a result of a call to the department he went to S. H. Kress and Company's store. He saw on 6 May 1960 all the defendants, except Coleman, seated at the counter in the luncheonette department. He heard W. K. Boger ask each one of them to leave, and all refused. He asked them to leave, and told them they could either leave or be arrested for trespassing. They refused to leave, and he charged them with trespassing. He knew W. K. Boger was manager of the store. He makes an arrest when an offense is committed in his presence, and the defendants were trespassing in his presence.

When the State rested its case, all seven defendants testified. The five Negro defendants testified in substance: All are students at North Carolina College for Negroes in Durham. Prior to 6 May 1960, Negroes, including some of the Negro defendants, had been refused service by S. H. Kress and Company in its luncheonette department. All are members of a student organization which met on the night of 5 May 1960, and planned to go the following day to Kress' store, make a purchase, and then to go to the luncheonette department, take seats, and request service.

The following day the five Negro defendants did what they planned.

The White woman defendant, Joan Harris Nelson, is a student at Duke University. Prior to 6 May 1960 she had not attended the meetings at the North Carolina College for Negroes for the purpose of securing service at the luncheonette department of the Kress store, though she has attended some of the meetings since then. She had been on the picket lines in front of the store. On 6 May 1960 she went into the Kress store, bought a ball-point pen, went to the luncheonette department, and took a seat. She was served, and while eating she offered to buy some food for Negroes from the North Carolina College, who were sitting on each side of her. When she was served food, no Negroes were in the luncheonette department. Mr. W. K. Boger asked her to leave because she was not invited, and was antagonizing customers. She did not leave, and was arrested.

The White male defendant, Frank McGill Coleman, is a student at Duke University. On 6 May 1960 he went into the Kress store, bought a mother's day card, joined his friend, Bob Markham, a Negro, and they went to the luncheonette department, and seated themselves. He asked for service, and was refused. Mr. W. K. Boger asked them to leave, telling them they were not invited guests, and he refused to do so, and was arrested. Prior to this date he had carried signs in front of the Kress store and other stores discouraging people to trade with them.

Some, if not all, of the defendants had been engaged previously in picketing the Kress store, and in urging a boycott of it, unless their demands for service in the luncheonette department were acceded to.

Jury Verdict: All the defendants, and each one of them, are guilty as charged.

From judgments against each defendant, each defendant appeals.

T. W. Bruton, Attorney General, and Ralph Moody, Assistant Attorney General, *for the State.*

William A. Marsh, Jr., M. Hugh Thompson, C. O. Pearson, W. G. Pearson, F. B. McKissick and L. C. Berry, Jr., *for Defendants-Appellants.*

Parker, J. Each defendant—five of whom are Negroes and two members of the White race—before pleading to the indictment against him or her made a motion to quash the indictment. The court overruled each motion, and each defendant excepted. The motions were made in apt time. *S.* v. *Perry*, 248 N. C. 334, 103 S. E. 2d 404; *Carter* v *Texas*, 177 U. S. 442, 44 L. Ed. 839; 27 Am. Jur., Indictments and Information, §141.

At the close of all the evidence each defendant made a motion for judgment of compulsory nonsuit. Each motion was overruled, and each defendant excepted.

S. H. Kress and Company is a privately owned corporation, and in the conduct of its store in Durham is acting in a purely private capacity to make a profit for its shareholders. There is nothing in the evidence before us, or in the briefs of counsel to suggest that the store building in which it operates is not privately owned. In its basement in the luncheonette department it operates a restaurant. "While the word 'restaurant' has no strictly defined meaning, it seems to be used indiscriminately as a name for all places where refreshments can be had, from a mere eating-house and cook-shop, to any other place where eatables are furnished to be consumed on the premises. Citing authority. It has been defined as a place to which a person

resorts for the temporary purpose of obtaining a meal or something to eat." *S.* v. *Shoaf*, 179 N. C. 744, 102 S. E. 705. To the same effect see, 29 Am. Jur., (1960), Innkeepers, §9, p. 12. In *Richards* v. *Washington F. & M. Ins. Co.*, 60 Mich. 420, 27 N. W. 586, the Court said: "A 'restaurant' has no more defined meaning, (than the English word shop), and is used indiscriminately for all places where refreshments can be had, from the mere eating-house or cookshop to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate." Quoted with approval in *Michigan Packing Co.* v. *Messaris*, 257 Mich. 422, 241 N. W. 236, and restated in substance in 43 C. J. S., Innkeepers, §1, subsection b, p. 1132.

No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. *S.* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295; *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845; *Slack* v. *Atlantic White Tower System, Inc.*, 181 F. Supp. 124, affirmed by the U. S. Court of Appeals for the 4th Circuit 27 December 1960, —— F. 2d ——; *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S. E. 2d 906; *Wilmington Parking Authority* v. *Burton* (Del.), 157 A. 2d 894; *Nance* v. *Mayflower*

Restaurant, 106 Utah 517, 150 P. 2d 773. See 10 Am. Jur., Civil Rights, §21; *Powell* v. *Utz*, 87 F. Supp. 811; and Annotation 9 Am. & Eng. Ann. Cas. 69—statutes securing equal rights in places of public accommodation. We have found no case to the contrary after diligent search, and counsel for defendants have referred us to none.

In *Alpaugh* v. *Wolverton*, *supra*, the Court said: "The proprietor of a restaurant is not subject to the same duties and responsibilities as those of an innkeeper, nor is he entitled to the privileges of the latter. Citing authority. His rights and responsibilities are more like those of a shopkeeper. Citing authority. He is under no common-law duty to serve every one who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds. Citing authority."

In *Boynton* v. *Virginia*, 5 December 1960, —— U. S. ——, —— L. Ed. ——, the Court held that a Negro passenger in transit on a paid Interstate Trailways' journey had a right to food service under the Interstate Commerce Act in a Bus Terminal Restaurant situate in the Bus Station, and operated under a lease by a company not affiliated with the Trailways Bus Company. Then the Court in the majority opinion deliberately stated: "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

In *S.* v. *Clyburn*, *supra*, the defendants were tried on similar warrants charging that each defendant unlawfully entered upon the land of L. A. Coletta and C. V. Porcelli after being forbidden to do so and did "unlawfully refuse to leave that portion of said premises reserved for members of the White Race knowing or having reason to know that she had no license therefor." Coletta and Porcelli did business under the trade name of Royal Ice Cream

Company retailing ice cream and sandwiches. The building in which they did business is separated by partition into two parts. One part has a door opening on Dowd Street, the other a door opening on Roxboro Street. Each portion is equipped with booths, a counter and stools. Over the Dowd Street door is a large sign marked Colored, over the Roxboro Street door is a similar sign marked White. Sales are made to different races only in the portions of the building as marked. Defendants, all Negroes, went into the building set apart for White patrons, and requested service. Coletta asked them to leave. They refused to do so, and they were arrested by a police officer of the city of Durham. All were convicted, and from judgments imposed, all appealed to the Supreme Court. We found No Error in the trial. The Court in its opinion said: "The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts in this nation. Madden v. Queens County Jockey Club, 72 N. E. 2d 697 (N. Y.); Terrell Wells Swimming Pool v. Rodriguez, 182 S. W. 2d 824 (Tex.); Booker v. Grand Rapids Medical College, 120 N. W. 589 (Mich.); Younger v. Judah, 19 S. W. 1109 (Mo.); Goff v. Savage, 210 P. 374 (Wash.); De La Ysla v. Publix Theatres Corporation, 26 P. 2d 818 (Utah); Brown v. Meyer Sanitary Milk Co., 96 P. 2d 651 (Kan.); Horn v. Illinois Cent. R. Co., 64 N. E. 2d 574 (Ill.); Coleman v. Middlestaff, 305 P. 2d 1020 (Cal.); Fletcher v. Coney Island, 136 N. E. 2d 344 (Ohio); Alpaugh v. Wolverton, 36 S. E. 2d 906 (Va.). The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants."

In an Annotation in 9 A. L. R., p. 379, it is said: "It seems to be well settled that, although the general public

have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so." The Annotation cites cases from eight states supporting the statement. See to the same effect, *Brookside-Pratt Min. Co.* v. *Booth*, 211 Ala. 268, 100 So. 240, 33 A. L. R. 417, and Annotation in 33 A. L. R. 421.

This is said by Holmes, J., for the Court in *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252, 256, 60 L. Ed. 984, 987, a suit to restrain the Public Utilities Commission from exercising jurisdiction over the business of a taxicab company: "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes . . . "

None of the cases cited in defendants' brief are applicable to the situation which obtains in the instant cases. For instance, *Cooper* v. *Aaron*, 358 U. S. 1, 3 L. Ed. 2d 5—public education; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531—public transportation; *Valle* v. *Stengel*, 176 F. 2d 697—a case in respect to an amusement park in the State of New Jersey, which State has a statute, R. S. 10: 1-3, N. J. S. A., providing that no proprietor of a place of public resort or amusement. " . . . shall directly or indirectly refuse, withhold from, or deny to, any person any of the accommodations, advantages, facilities or privileges thereof . . . on account of race, creed or color," R. S. 10: 1-6, N. J. S. A.

"The right of property is a fundamental, natural, inherent, and inalienable right. It is not *ex gratia* from the legislature, but *ex debito* from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government. The right of property is very broad and embraces practically all incidents which property may manifest. Within this right are included the right to acquire, hold, enjoy, possess, use, manage, . . . property." 11 Am. Jur., Constitutional Law, §335.

G. S. 14-134 has been the statute law of this State for nearly a hundred years. It reads: "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days." Then follows a proviso as to obtaining a license to go upon land of another to look for estrays. This statute is color blind. Its sole purpose is to protect people from trespassers on their lands. It is concerned with only three questions. One, was the land in either the actual or constructive possession of another? Two, did the accused intentionally enter upon the land of another? Three, did the accused so enter upon the land of another after being forbidden to do so by the person in possession? *S. v. Baker*, 231 N. C. 136, 56 S. E. 2d 424.

G. S. 14-126 has been the statute law of this State for many years, and reads: "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor." This statute

is also color blind. "Its purpose is to protect possession only." *S.* v. *Baker, supra* We have repeatedly held in applying G. S. 14-126 that a person who remains on the land of another after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful. The word "entry" as used in each of these statutes is synonymous with the word "trespass." *S.* v. *Clyburn, supra.*

The officer of the city of Durham had a right and duty to arrest all seven defendants in the luncheonette department of the Kress store, because all of them were committing misdemeanors in his presence. G. S. 15-41. There is no merit in their contention that this constituted State action denying them rights guaranteed to them by the 14th Amendment to the Federal Constitution and by Article I, §17, of the State Constitution. *S.* v. *Clyburn, supra.*

Defendants in essence contend that the indictments should be quashed and the cases nonsuited because the judicial process here constitutes State action to enforce racial segregation in violation of their rights under the due process clause and under the equal protection of the laws clause of the 14th Amendment to the Federal Constitution, and in violation of their rights under Article I, §17, of the State Constitution, and further that G. S. 14-134 and G. S. 14-126 are being unconstitutionally applied for the same purpose. Defendants misconceive the purpose of the judicial process here. It is to punish defendants for unlawfully and intentionally trespassing upon the lands of S. H. Kress and Company, and for an unlawful entry thereon, even though it enforces the clear legal right of racial discrimination of the owner. There is no merit to this contention.

The Court said in *Shelley* v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 1161, 3 A. L. R. 2d 441: "Since the decision of this Court in the Civil Rights Cases, 109 US 3, 27 L ed

835, 3 S Ct 18 (1833), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." This interpretation has not been modified: *Collins* v. *Hardyman*, 341 U. S. 651, 95 L. Ed. 1253; *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 97 L. Ed. 1480.

Private rights and privileges in a peaceful society living under a constitutional form of government *like ours* are inconceivable without State machinery by which they are enforced. Courts must act when parties apply to them—even refusal to act is a positive declaration of law—, and, hence, there is a fundamental inconsistency in speaking of the rights of an individual who cannot have judicial recognition of his rights. All the State did in these cases was to give or create a neutral legal framework in which S. H. Kress and Company could protect its private property from trespassers upon it in violation of G. S. 14-134 and G. S. 14-126. There is a recognizable difference between State action that protects the plain legal right of a person to prevent trespassers from going upon his land after being forbidden, or remaining upon his land after a demand that they leave, even though it enforces the cleared legal right of racial discrimination of the owner, and State action enforcing covenants restricting the use or occupancy of real property to persons of the Caucasian race. The fact that the State provides a system of courts so that S. H. Kress and Company can enforce its legal rights against trespassers upon its private property in violation of G. S. 14-134 and G. S. 14-126, and the acts of its judicial officers in their official capacities, cannot fairly be said to be State action enforcing racial segregation in violation of the 14th Amendment to the Federal Constitution. Such

judicial process violates no rights of the defendants guaranteed to them by Article I, §17, of the State Constitution. To rule as contended by defendants would mean that S. H. Kress and Company could enforce its rights against White trespassers alone, but not against Negro trespassers and White and Negro trespassers in company. Surely, that would not be an impartial administration of the law for it would be a denial to the White race of the equal protection of the law. If a land owner or one in possession of land cannot protect his natural, inherent and constitutional right to have his land free from unlawful invasion by Negro and White trespassers in a case like this by judicial process as here, because it is State action, then he has no other alternative but to eject them with a gentle hand if he can, with a strong hand if he must. Annotation 9 A. L. R., p. 379 quoted above; 4 Am. Jur., Assault and Battery, §76, p. 167; 6 C. J. S., Assault and Battery, §20, (2). This is said in 4 Am. Jur., Assault and Battery, §76, p. 168: "Even though the nature of the business of the owner of property is such as impliedly to invite to his premises persons seeking to do business with him, he may, nevertheless, in most instances refuse to allow a certain person to come on his premises, and if such person does thereafter enter his premises, he is subject to ejection although his conduct on the particular occasion is not wrongful." It is further said in the same work, same article, §78: "The right lawfully to eject trespassers is not limited to the owner or occupier of the premises, but may be exercised by his agent in any case where the principal might exercise the right." The motive of the owner of land in ejecting trespassers from his premises is immaterial so long as he uses no more force than is necessary to accomplish his purpose. 6 C. J. S., Assault and Battery, p. 821. White people also have constitutional rights as well as Negroes, which must be protected, if our constitutional

form of government is not to vanish from the face of the earth.

This is said in an article designated "The Meaning of State Action" by Thomas P. Lewis, Associate Professor of Law, University of Kentucky, and appearing in Columbia Law Review, December 1960, Vol. 60, No. 8, in note 134, page 1122: "State court recognition of the restaurateur's private discrimination could be in the form of denial of any action against him by an aggrieved party. A related issue is the ability of the state to enforce through arrest and an action for trespass the discrimination of the private owner. None of the interpretations of Shelley (*Shelley* v. *Kraemer*, 334 U. S. 1, 92 L. Ed. 1161) of which the writer is aware, except Professor Ming's, *supra* note 92 (Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases, 16 U. Chi. L. Rev. 203 (1949)) would extend it to this kind of case."

In *Slack* v. *Atlantic White Tower System, Inc.*, *supra*, the Court said: "No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency."

In *S.* v. *Cooke*, 248 N. C. 485, 103 S. E. 2d 846, the defendants were convicted and sentenced on a charge that they did "unlawfully and willfully enter and trespass upon the premises of Gillespie Park Club, Inc., after having been forbidden to enter said premises." We found no error. Their appeal was dismissed by a divided court by the United States Supreme Court. *Wolfe* v. *North Carolina*, 364 U. S. 177, 4 L. Ed. 2d 1650. In neither the majority opinion nor in the minority opinion was the question

of State action referred to. It seems that if the United States Supreme Court had thought that the arrest and prosecution was State action, it would have reversed our decision. It seems further that the action of that Court in dismissing the appeal means that a State has the power to enforce through arrest and an action for trespass the discrimination of a private owner of a private business operated on premises privately owned.

There is no merit in defendants' contention that all the cases should be nonsuited, because the demands that they leave Kress' store, their arrest by an officer of the city of Durham, and the judicial process here, is an unconstitutional interference with their constitutional rights of free speech, and of assembly to advocate and persuade for a termination of racial discrimination.

No one questions the exercise of these rights by the defendants, if exercised at a proper place and hour. However, it is not an absolute right. The answer to this contention is given by the Court in *Kovacs* v. *Cooper*, 336 U. S. 77, 93 L. Ed. 513, 10 A. L. R. 2d 608: "Of course, even the fundamental rights of the Bill of Rights are not absolute. The *Saia* Case recognized that in this field by stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, *Schenck* v. *United States*, 249 US 47, 52, 63 L ed 470, 473, 39 S Ct 247, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.' Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in

a place and at a time beyond the protecting hand of the guardians of public order."

The evidence in these cases shows that the White defendants, and most, if not all, of the Negro defendants were freely and without molestation exercising these rights upon the streets of the city of Durham. However, they had no constitutional right to exercise these rights as trespassers in Kress' store in violation of G. S. 14-134 and G. S. 14-126 in Kress' store.

There is no merit in defendants' contention that the indictments should be quashed, and the cases nonsuited, because S. H. Kress and Company is licensed by the city of Durham to operate a retail store, and therefore racial discrimination in the store cannot be enforced. The license is not in the record before us, and there is no suggestion by defendants that the license issued to S. H. Kress and Company contained any restrictions as to whom S. H. Kress and Company should serve. The answer to this contention, showing it is without merit, is set forth in *S.* v. *Clyburn, supra,* in *Slack* v. *Atlantic White Tower System, Inc., supra,* and in *Williams* v. *Howard Johnson's Restaurant, supra,* and defendants' contention is overruled upon authority of those cases. In the last case the Court said: "The customs of the people of a State do not constitute State action within the prohibition of the Fourteenth Amendment."

Defendants further contend that the indictments should be quashed, and the cases nonsuited, because G. S. 14-134 is too indefinite and vague to be enforceable under the due process clause of the 14th Amendment and under Article I, §17, of the State Constitution, in that the statute does not require the person in charge of the premises to identify himself, and in that W. K. Boger did not identify himself when he asked them not to enter the luncheonette department, and when he asked them to leave after they seated themselves. This contention is not tenable.

G. S. 14-134 necessarily means that the person forbidding a person to go or enter upon the lands of another shall be the owner or occupier of the premises or his agent, and that is an essential element of the offense to be proved by the State beyond a reasonable doubt. The statute is not too vague and indefinite to be enforceable as challenged by defendants, because it does not use the specific words that the person forbidding the entry shall identify himself. This is a matter of proof.

On a motion for judgment of compulsory nonsuit the State's evidence is to be considered in the light most favorable to the State, and the State is entitled to the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. *S.* v. *Corl,* 250 N. C. 252, 108 S. E. 2d 608. In our opinion, when the State's evidence is so considered, it permits the reasonable inference that all the defendants knew when W. K. Boger forbade them to go upon or enter the luncheonette department, and requested them to leave after they had seated themselves there, he was the agent of S. H. Kress and Company in charge of the store, and we so hold.

Defendants contend that all the cases should be nonsuited because the evidence is insufficient to carry the case to the jury. All defendants introduced evidence. Having done so, they waived their motions for judgment of involuntary nonsuit which they had made at the close of the State's case, and must rely on their similar motions made at the close of all the evidence. G. S. 15-173.

Considering the State's evidence in the light most favorable to the State, and not taking defendants' evidence into consideration unless favorable to the State, or except when not in conflict with the State's evidence, it may be used to explain or make clear the State's evidence (*S.* v. *Nall,* 239 N. C. 60, 79 S. E. 2d 354), as we are required to do in passing upon defendants' motion made at the close of all the

evidence, it tends to show that all the defendants without legal or constitutional right or *bona fide* claim of right entered the luncheonette department of S. H. Kress and Company after having been forbidden by W. K. Boger, the manager and agent of S. H. Kress and Company there, to do so, and after they had been requested by him to leave, refused to do so. The fact that the violations by all defendants of G. S. 14-126 and G. S. 14-134 were intentional, is shown clearly by their acts, by the two White defendants and by most, if not all, of the Negro defendants in urging people to boycott the Kress store, and further by the plan entered into by the Negro defendants on the night of 5 May 1960 to go the following day to the Kress store, enter the luncheonette department there, take seats, and demand service. The evidence was sufficient to carry the cases to the jury, and we so hold.

The motions to quash the indictments raise most, if not all, of the constitutional questions raised by the motions for judgments of compulsory nonsuit made at the close of all the evidence. All these questions have been considered by the Court and most, if not all, discussed in the opinion. In our opinion, and we so hold, the trial court properly overruled the motions to quash the indictments, and correctly submitted all the cases to the jury.

Defendants' assignments of error relating to the evidence are without merit, and do not justify discussion.

Defendants' assignment of error to the charge of the court to the jury is to the whole charge, without any statement as to what part of it is, as they contend, error. Such an assignment of error is too general and indefinite to present any question for decision. *S.* v. *Dillard*, 223 N. C. 446, 27 S. E. 2d 85, and cases there cited. In that case the Court said: "Unpointed, broadside exceptions will not be considered. Citing authority. The Court will not go on a voyage of discovery to ascertain wherein the judge failed

to explain adequately the law in the case. Citing authority. The assignment must particularize and point out specifically wherein the court failed to change the law arising on the evidence." Further, defendants in their brief make no mention of the charge, and no exception to the charge appears in the record, except in the assignment of error. An assignment of error will be disregarded when it is not supported by an exception in the record, but only by an exception appearing in the assignment of error. *Barnette* v. *Woody*, 242 N. C. 424, 88 S. E. 2d 223; *Watters* v. *Parrish*, 252 N. C. 787, 115 S. E. 2d 1. The assignment of error as to the charge as a whole, not being mentioned, in defendants' brief is taken as abandoned by defendants. Rules of Practice in the Supreme Court, Rule 28, 221 N. C. 544; *S.* v. *Atkins*, 242 N. C. 294, 87 S. E. 2d 507. However, a reading of the charge, which is in the record, shows that the trial judge correctly declared and explained the law arising on the evidence given in the cases, as required by G. S. 1-180, and in particular instructed the jury to the effect that if the defendants entered the luncheonette department of the Kress store after being forbidden under a *bona fide* claim of right and if they had reasonable grounds for such belief, and refused to leave after they had been requested to do so under such claim, as they contend their evidence tended to show, then there would be no criminal responsibility, and it would be the duty of the jury to acquit all defendants. *S.* v. *Clyburn*, *supra*; *S.* v. *Fisher*, 109 N. C. 817, 13 S. E. 878. This Court said in *S.* v. *Crawley*, 103 N. C. 353, 9 S. E. 409, which was a criminal action for entry upon land after being forbidden: "A mere *belief* on his part that he had such claim would not be sufficient—he was bound to prove that he had reasonable ground for such belief, and the jury should so find under proper instructions from the court. *S.* v. *Bryson*, 81 N. C. 595." This Court said in *S.* v. *Wells*, 142 N. C.

590, 55 S. E. 210: "True we have held in several well-considered decisions, that when the State proves there has been an entry on another's land, after being forbidden, the burden is on the defendant to show that he entered under a license from the owner, or under a *bona fide* claim of right. And on the question of *bona fides* of such claim, the defendant must show that he not only believed he had a right to enter, but that he had reasonable grounds for such belief. *S.* v. *Glenn*, 118 N. C., 1194; *S.* v. *Durham*, 121 N. C., 546. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his right to enter, then in addition to his right, the question of his *bona fide* claim of right must be in some proper way considered and passed upon before he can be convicted." Defendants have nothing to complain of in respect to the charge, and their counsel evidently thought so by not mentioning the charge in their joint brief filed with us.

Defendants' motions in arrest of judgment, which the court overruled, and which defendants assign as error, are not mentioned in defendants' brief, and are taken as abandoned by defendants.

All of the assignments of error by the defendants have been considered, and all are overruled. Defendants have not shown the violation of any of their rights, or of the rights of any one of them, as guaranteed by the 14th Amendment to the Federal Constitution, and by Article I, §17, of the North Carolina Constitution.

No Error.

A TRUE COPY:

/s/ ADRIAN J. NEWTON
Clerk of Supreme Court of North Carolina.

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October Term, 1960/63

No. ~~945~~ 5

JAMES A. FOX and ALBERT R. SAMPSON,
Petitioners,

vs.

STATE OF NORTH CAROLINA
Respondent.

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1960

No. 944

JAMES A. FOX and ALBERT R. SAMPSON,
Petitioners,

vs.

STATE OF NORTH CAROLINA
Respondent.

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW

The opinion of the Supreme Court of North Carolina, in this case, is reported as STATE v. FOX, 254 N. C. 97 (No. 1, Advance Sheets of the Supreme Court, issued March 9, 1961); 118 S. E. 2d 58. This opinion is also set forth in the Petitioners' Appendix at p. la and the opinion in this case is based upon the opinion of the Supreme Court of North Carolina in STATE v. AVENT, et als, 253 N. C. 580 (No. 6, Advance Sheets of the Supreme Court, issued February 15, 1961); 118 S. E. 2d 47. The opinion in the AVENT case is also set forth in the Petitioners' Appendix to their brief in this case beginning on p. 5a, the opinion having been

written by Mr. Justice Parker and not by "Mr. Justice Mallard." The Judgment of the Superior Court of Wake County, which is a court of general jurisdiction, is shown on p. 28 of the State Record (No. 442, 10th District, Fall Term 1960) certified to this Court by the Clerk of the Supreme Court of North Carolina. It is not officially reported in any legal publication.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1257 (3), the Petitioners alleging a violation of constitutional rights secured by the Fourteenth Amendment. The Respondent, State of North Carolina, denies that the Petitioners have shown a sufficient basis for this Court to exercise its jurisdiction.

QUESTIONS PRESENTED

The Respondent, State of North Carolina, will present its Brief in opposition to the Petitioners' application for Writ of Certiorari upon the assumption that the three questions stated by Petitioners on p. 2 of their Brief are the issues involved in the case.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Petitioners rely upon Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Petitioners also attack Section 14-134 of the General Statutes of North Carolina, the pertinent part of which is as follows:

"G.S. 14-134. Trespass on land after being forbidden. If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdeameanor, and on conviction, shall

be fined not exceeding fifty dollars or imprisoned not more than thirty days."

RESPONDENT'S STATEMENT OF THE CASE

In this Brief the Respondent will refer to the State Record certified to this Court by the Clerk of the Supreme Court of North Carolina by the designation of SR.

On March 21, 1960, the Petitioners Fox and Sampson were students at Shaw University, Sampson being a resident of the State of Massachusetts and Fox being a resident of Washington, D. C. (SR - 80, 85) On this day the Petitioners were walking up and down in front of the McLellan Store picketing the store and carrying signs on which were printed statements, or slogans, relating to their desire to be served at the lunch counter in the store. These two Petitioners were students at Shaw University but they testified that there was a movement both at Shaw and Saint Augustine Colleges to picket and protest all stores which would not permit them to be served at the lunch counters located in the stores. (SR - 80, 85) After these Petitioners had engaged in picketing for a while the Petitioner Sampson called the Petitioner Fox' attention to the fact that the lunch counter in McLellan Store was unblocked. (SR - 81, 85) The management of the store had fenced off the cafe, or restaurant, portion with a fence located approximately two feet from the 43 stools at the lunch counter and at the entrance to the lunch counter had placed a sign 11 x 14 inches, saying: "Employees and Guests Only" and on the lefthand side of the gate to the cafe another sign 11 x 7 inches had been placed on which appeared: "No Trespassing." These signs were at the gate, or entrance, to the lunch counter portion of the store, and they faced away from the lunch counter towards the front of the store and the doors entering from Fayetteville Street. (SR - 50)

Pursuant to instructions and on the advice of leaders, the Petitioners, for the purpose of creating circumstances which would lead to this case which their counsel wished to use as a test case, first made some small purchases in

the general part of the store which they conceived would strengthen their legal position when they made their planned and intentional entrance into the fenced-off portion of the store which contained the lunch counter. (SR - 81, 85) After the purchases the Petitioners entered into the lunch counter portion where the Manager told them he did not have facilities to serve colored people and for them to leave. (SR - 51) They stated that they were not going to leave and that they wanted to get service, and they were again asked by the Manager to leave; they refused to do so and continued to sit at the lunch counter. (SR - 51) The Assistant Manager was asked to get a patrolman, which he did, and Patrolman Duke came into the store and was informed as to what was taking place. The Manager again, upon the advice of the patrolman, went to the Petitioners and asked them to leave; then the patrolman went to the Petitioners and informed them that he would give them one minute to leave the store and when that time was up he would have to arrest them. (SR - 51, 58) The Manager testified that he asked the Petitioners to leave five times and that he was told by them twice that they were not going to leave. (SR - 52) It is clear that the Petitioners knew that they were not wanted and would not be served at the store's lunch counter because they had been observed by the Manager a week prior to this occasion walking up and down in front of the store with picketing signs and passing out leaflets claiming discrimination. (SR - 52) They also had seen the signs at the entrance to the lunch counter and knew the purpose of the signs. (SR - 52, 53) The manager testified (SR - 53) that he could not operate the store normally and serve colored people at the lunch counter. The Manager testified (SR - 53) that he had had previous trouble with colored students from Shaw University coming in, sitting down, and taking possession of his lunch counter and that was the reason he placed the fence around the lunch counter with the signs. On the day that this occurrence took place there were 25 or 30 white people at the lunch counter (SR - 54) and the Manager thought that Sampson ordered a cup of coffee. (SR - 55) The Manager further testified that these Petitioners were interfering with his

business because he did not have the facilities to serve colored people. (SR - 55)

Officer Duke testified that when he came in he was informed of the situation and he asked the Petitioners to leave; that he told the Manager to ask them again to leave in his presence, which was done. (SR - 58) Officer Duke then told them they had one minute in which to leave and if they did not leave within that time he would arrest them for trespassing. Officer Duke then looked at his watch and when 45 seconds had elapsed he informed the Petitioners that they had 15 seconds left; when that time was up the Petitioners continued to occupy the lunch counter stools, and he arrested Petitioners and carried them to the Wake County Jail. On the way to the jail Sampson said that the arrest was what they wanted and Fox said he had been thinking about joining the Police Department when he finished college. (SR - 59) The Petitioners, therefore, had achieved their objective and had carried out their plans and instructions in that they intentionally and wilfully committed a trespass in order to be arrested and thereby create a test case for their counsel. They were given every opportunity to leave the lunch counter part of the store, they knew a policeman had been sent for, and after the policeman came they were again given every opportunity to leave without arrest.

ARGUMENT

I

THE STATE PROSECUTION DID NOT DEPRIVE PETITIONERS OF ANY RIGHTS PROTECTED BY THE FOURTEENTH AMENDMENT.

Petitioners in their Brief assert several propositions relating to race discriminations prohibited by the Fourteenth Amendment about which there is no contest and which do not come within the ambit of the issues to be resolved in this case. Some of these propositions, about which there is no controversy, are as follows:

(1) The Respondent admits that action by the judicial branch of a state government can be such a type of state action that offends against the prohibitory provisions of the Fourteenth Amendment (SHELLEY v. KRAEMER, 334 U. S. 1; BARROWS v. JACKSON, 346 U. S. 249; Race Relations Law Reporter, Vol. 1, No. 3, pp. 613, 622). We still think there is such a thing as valid state action by the judicial branch of a state government.

(2) The Respondent admits that the provisions of the Fourteenth Amendment extend to and reach the conduct of state police officers (MONROE v. PAPE, No. 39, Oct. Term, 1960, Feb. 20, 1961; SCREWS v. UNITED STATES, 325 U. S. 91). We deny that it extends to and reaches valid conduct of state police officers exercised under valid state authority.

(3) We admit that there can be unlawful state action by a police officer acting under "color of law" where a state has enacted a Civil Rights statute which prohibits the denial of accommodations or privileges to a person because of color in places of amusement or in restaurants. (VALLE v. STENGEL, CCA-3, 176 F. 2d 697, 701). We think the rule can be different where a state has no such statute.

(4) We admit that where a state grants a franchise to a public utility there cannot be discrimination in the use of facilities or services furnished the patrons because of color nor can the state enforce such discriminations by delegating the power to make rules or by criminal sanctions (BOMAN v. BIRMINGHAM TRANSIT CO., CCA-5, 280 F. 2d 531; BOWDER v. GAYLE, 142 F. Supp. 707, aff'd 352 U. S. 903; FLEMING v. SOUTH CAROLINA ELEC. & GAS CO., CCA-4, 224 F. 2d 752). We deny that this rule applies to business under private ownership.

(5) We admit that all citizens, white and colored, have the right to contract, acquire and own property, are entitled to security of person and property, and to inherit, purchase, lease, hold and convey real and personal property as set

forth in R.S. 1977, 42 USC 1981, and R.S. 1978, 42 USC 1982. We do not admit that any person, white or colored, can be constitutionally forced to sell any private property or product to another person, or that one person is forced to negotiate with another person in or about any property or business transaction.

(6) We admit that there is an abundance of legal authority to the effect that a state or a subdivision of a state which operates restaurants or other facilities, or operates playgrounds or parks, or facilities of this nature, cannot by the device of a lease to private persons or firms discriminate against colored persons who desire to use such facilities, and that "the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." (BURTON v. WILMINGTON PARKING AUTHORITY, 29 U. S. Law Week 4317, No. 164, Oct. Term 1960, April 17, 1961; DERRINGTON v. PLUMMER, CCA-5, 240 F. 2d 922; CITY OF GREENSBORO v. SIMKINS, CCA-4, 246 F. 2d 425; DAWSON v. BALTIMORE, CCA-4, 220 F. 2d 386, aff'd 350 U. S. 877).

(7) We don't think the cases on discrimination in public schools have anything to do with this case, but we admit there can be no state action which supports racial discrimination in this field and as set forth in the cases of BROWN v. BOARD OF EDUCATION, 347 U. S. 483, BOLLING v. SHARPE, 347 U. S. 497, and COOPER v. AARON, 358 U. S. 1.

Our contentions and the concepts that we believe to be sound have been fully stated by Mr. Justice Parker in STATE v. AVENT et als., 253 N. C. 580 (N. C. Advance Sheets No. 6, issued Feb. 15, 1961), 118 S. E. 2d 47, Petitioners' Appendix p. 2a. The matter has been considered by the law review writers (47 Virginia Law Review—No. 1, Jan. 1961, p. 1; 46 Virginia Law Review - 1960 - p. 123; 15 U. of Miami Law Review - No. 2 - 123; Race Relations Law Reporter, Vol. 5, No. 3 - Fall 1960 - p. 935; 1960 Duke Law Journal 315).

We assert that private citizens or persons have the right to practice private discrimination for or against each other. This runs all through the fabric of society and life. Clubs, lodges and secret societies will accept some as members and reject others. The country club people do not associate with the people that live in slum areas and across the railroad track. The people of some races will have no dealings with people of other races. Discriminations are practiced inside the race group. The colored insurance men, doctors and bankers do not have social affairs that are open to the cotton and cornfield Negroes. We further assert that any colored citizen can refuse to transact business with a white person or to have him on his business premises and the rule applies in reverse. Up to the present time, in private business, no man has been compelled to sell his product, goods or services to another unless he desired to so do. The reasons or motives that prompt his choice of action are irrelevant. The same private rights in the use and enjoyment of property are available to all. The protection of these private rights is not an "indiscriminate imposition of inequalities". As said by Mr. Justice Holmes (TERMINAL TAXICAB CO. v. KUTZ, 241 U. S. 252, 256):

> "It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing on the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes * * *."

This court carefully stated (SHELLEY v. KRAEMER, 334 U. S. 1):

> "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." (citing in the note: UNITED STATES v. HARRIS, 106 U. S. 629; UNITED STATES v. CRUIKSHANK, 92 U. S. 542.)

In BOYNTON v. VIRGINIA, 5 L. ed. 2d 206, _____ U. S. _____, this Court said:

> "We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act."

But if there existed another vital, and primary constitutional principle that required that restaurant service be supplied by the roadside restaurant to a colored man, then there would seem to be no reason why this Court should pass it by and not settle the question.

The State Statute here under consideration is an old statute and has been passed upon by the Supreme Court of North Carolina many times. It appears in the State code as G. S. 14 - 134 and we refer the Court to certain cases, as follows: STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295; STATE v. COOKE et als., 246 N. C. 518, 98 S. E. 2d 885; STATE v. GOODSON, 235 N. C. 177, 69 S. E. 2d 242; ARMSTRONG v. ARMSTRONG, 230 N. C. 201, 52 S. E. 2d 362; LEE v. STEWART, 218 N. C. 287, 10 S. E. 2d 804; STATE v. BAKER, 231 N. C. 136, 56 S. E. 2d 424. See also cases cited in annotation to Sec. 14 - 134 in General Statutes of North Carolina, and the 1959 Supplement thereto. A related statute is G. S. 14 - 126 which is as follows:

> "No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor."

This statute was borrowed from English law and in substance is 5 Richard II, c. 8, and in fact it would appear that this statute and the one under consideration are formulations of the common law.

The statute now attacked by Petitioners is a neutral sta-

tute and has no connection with the color of persons. We challenge the Petitioners to trace the reported decisions and show that in its judicial administration it has been applied to colored persons and not to white persons. It is available to the colored man if a white man will not leave his premises when requested to do so.

The implied invitation to the general public to come into a shop or store can lawfully be revoked. On this aspect of the case the Supreme Court of North Carolina (253 N. C. 580, 588) said:

> "In an Annotation in 9 A.L.R., p. 379, it is said: 'It seems to be well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so.' The Annotation cites cases from eight states supporting the statement. See to the same effect, BROOKSIDE-PRATT MIN. CO. v. BOOTH, 211 Ala. 288, 100 So. 240, 33 A.L.R. 417, and Annotations in 33 A.L.R. 421".

Leaving aside the question of void-for-vagueness, the interpretation of the highest appellate Court of a state should be accepted by the Federal Courts (AMERICAN FEDERATION OF LABOR v. WATSON, 327 U. S. 582; PHILLIPS v. UNITED STATES, 312 U. S. 246; HIGHLAND FARMS DAIRY v. AGNEW, 300 U. S. 608).

The Petitioners have not cited any case dealing with private discrimination which supports their position, and indeed they cannot do so. Up to the present time the Courts that have considered the matter support our position (STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295; WILLIAMS v. HOWARD JOHNSON'S RESTAURANT, 268 F. 2d 845; SLACK v. ATLANTIC WHITE TOWER SYSTEM, INC., 181 F. Supp. 124, aff'd 284 F. 2d 746; see also cases cited in opinion of Supreme Court of North Carolina in this case, and in law review articles cited supra).

As we see the matter, up to the present time, wherever the prohibitions of the Fourteenth Amendment have been invoked there has been a clear, established right to be protected from state action or from any discrimination aided or assisted by state action. Up to the present time in this case the Petitioners are starting from a position where they have no clear, established right to be protected by constitutional guarantees. They are asking the Court to invent, create or conjure up the claimed right and then say it is entitled to the protection of the Fourteenth Amendment. If it shall be said that the State court cannot exert its power to protect the property rights of either race but will leave the parties to their own devices, or to the exercise of personal force, then the result will be something that neither the white or colored race really desires.

II

THE STATE STATUTE IS NOT UNCONSTITUTIONAL FOR UNCERTAINTY AND VAGUENESS.

The Petitioners' next attack on the statute comes under the so-called vold-for-vagueness doctrine. Here we enter into a field of constitutional law which it seems to us is measured entirely by subjective tests.

There is one thing sure however—the Petitioners were engaged in a previously organized campaign and there is strong reason to believe from the evidence that they had the advice of counsel. The Supreme Court of North Carolina has construed G. S. 14 - 134 many times to include the situation where a person enters upon lands or premises without protest and is later told by the owner or proprietor to leave the premises. The case of STATE v. CLYBURN, 247 N. C. 455, 101 S. E. 2d 295, was decided on January 10, 1958, and Petitioners and their counsel had ample warning of this construction of the statute. We have heretofore cited above many cases in which the Supreme Court of North Carolina has construed the statute. This Court has said in substance that impossible standards of definition are not required and

that it is sufficient if the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." On this point, see ROTH v. UNITED STATES, 354 U. S. 476, and see annotation in 1 L. ed 2nd, p. 1511.

This State statute is certainly no more vague or uncertain than 18 USCA 242, which reads as follows:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000.00, or imprisoned not more than one year, or both."

This Court reviewed the statute and its history and upheld the statute against an attack based on unconstitutional vagueness in SCREWS v. UNITED STATES, 325 U. S. 91.

For other causes in which statutes have been upheld against such an attack see: BEAUHARNAIS v. ILLINOIS, 343 U. S. 250, COLE v. ARKANSAS, 338 U. S. 345, WILLIAMS v. UNITED STATES, 341 U. S. 97, UNITED STATES v. WURZBACH, 280 U. S. 396.

As a practical matter, an ordinary layman has trouble with any statute no matter how precise its standards of conduct and no matter how clear it may be in the informational process. Statutes really are written for lawyers to read and to form opinions and advise clients thereon, and the statute now under attack when considered with the constructions of the highest appellate Court of the State clearly informs Counsel for Petitioners what the consequences could be.

There must be some latitude in statutory language be-

cause statutes are drafted for the most part in an attempt to take care of unanticipaed situations as well as those that may be in contemplation when the drafting process is first initiated. In NASH v. UNITED STATES, 229 U. S. 378, Mr. Justice Holmes summed up the situation as follows:

> "But, apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death.'

This question has also been written about extensively by the law review writers and in closing this portion of the argument we cite a few of these articles but this is not to be construed by the Court as meaning that we approve all the criticisms and conclusions of the authors (109 University of Pennsylvania Law Review - No. 1, November 1960 - p. 67, 62 Harvard Law Review 77, 40 Cornell Law Quarterly 195).

III

THE STATUTE AS ADMINISTERED DOES NOT VIOLATE THE CONSTITUTIONAL PROTECTION OF FREEDOM OF SPEECH.

We assume here that the Petitioners are dealing with the principles of the First Amendment insofar as they may be incorporated in the Fourteenth Amendment. The evidence shows that Petitioners exercised their right of free speech to the fullest extent. Petitioners and their adherents had for days been exercising their right to protest and the right of freedom of speech by writings and slogans on placards which they carried up and down the streets in front of the stores. This was certainly true in the AVENT case and in both cases there is no evidence to show that they had been restrained in any manner in the exercise of this right. The use of the streets and sidewalks of the town and city con-

cerned had been utilized by Petitioners in the AVENT case and there is no reason to believe that any restraints would have been placed upon Petitioners in the exercise of free speech in any proper place. Of course, free speech is not a mighty shield that insulates a person from liability in all types of criminal conduct. Such a logic would extend free speech as a protection from the penalty of murder and would act as a complete and conclusive defense for the commission of all criminal acts. This is explained by a paragraph in KOVACS v. COOPER, 336 U. S. 77, where this Court said:

> "Of course, even the fundamental rights of the Bill of Rights are not absolute. The SAIA case recognized that in this field by stating 'The hours and place of public discussion can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, SCHENCK v. UNITED STATES, 249 U. S. 47, 52, 63 L. Ed 470, 473, 39 S Ct 247, that: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.'
>
> "Hecklers may be expelled from assemblies and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order."

In the case of MILK WAGON DRIVERS UNION v. MEADOWMOOR DAIRIES, 312 U. S. 287, 61 S. Ct. 552, 85 L. ed 836, the Court sustained an injunction against picketing where there was a history of past violence against a plea of freedom of speech and distinguished the case from that of THORNHILL v. ALABAMA, cited by the Petitioners, and said:

> "This is precisely the kind of situation which the Thornhill opinion excluded from its scope. 'We are not now

> concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger.' 310 U. S. 105, 84 L. Ed. 1104, 60 S. Ct. 736. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coersive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

We shall not burden the Court with further citations from case law but it is sufficient to say that the injuctions sustained by this Court in labor disputes where violence and destruction of property were involved are certainly not constitutionally invalid because those who were engaged in picketing carried banners and mottoes and other writings in the exercise of communications and freedom of speech.

The case of MARSH v. ALABAMA, supra, is no exception to this rule. The defendants in the MARSH case were distributing religious literature and engaged in talking to persons on the streets of a company-owned town. They were not in stores interfering with the businesses of private proprietors. The Supreme Court of the United States simply said that where a company owned the streets and sidewalks the people of the town were compelled to use them in community affairs, that these streets and sidewalks were constitutionally dedicated to the public in the same manner as the streets of a municipal corporation.

IV

CONCLUSION

This Court in these cases is being asked to take a step which has never before been taken with reference to the use and enjoyment of property rights. To grant the request of the Petitioners opens the door to the socialization of all property and would mean that while a proprietor may have the privilege of holding the bare legal title yet the property would be subjected by the State to so many social demands that it would be almost analogous to property held in the corporative state organized and administered for awhile by Mussolini. Petitioners realize that their logic, as derived from their premises, leads to great extremes and they try to hedge against these extremes. For example, must the Petitioners be given entrance to the office of the manager and must they be allowed to go to the stockroom? Suppose the clerks tell Petitioners that they do not have certain articles and the Petitioners think they can find some of the articles in the stockroom, can they go to the stockroom over the protest of the management? Suppose private properietors are compelled to sell to Petitioners, at what price must they sell? If a private properietor sold articles or food to his friends at no cost or at a cheaper rate than usual, would this violate Petitioners' civil rights? Under their own theory, why should not Petitioners be allowed to enter into any private home they desire so long as they say that they are protesting and exercising free speech? The Petitioners' request should not be granted unless the Court thinks we should have a completely socialized state. There should be left to an individual some property rights that he can call his own or else why should we have the institution of private property. We ask the Court not to take such a step and in this connection we again remind the Court of the langauage this Court used in civil rights cases (109 U.S. 3) when it said:

> "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage

in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected."

Respectfully submitted,

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Supreme Court of the United States

October Term, 1963

No. 5

JAMES A. FOX and ALBERT R. SAMPSON,

Petitioners,

—v.—

STATE OF NORTH CAROLINA.

MEMORANDUM

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IN THE

Supreme Court of the United States

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On June 13, 1963 the office of the Clerk requested, pursuant to direction by the Court, "that a memorandum be filed in the above captioned case as to whether or not there is a statute, ordinance, or executive order requiring discrimination on the basis of race."

Petitioners submit that administrative action in the nature of the categories about which inquiry was made has been adopted. The following excerpt from *Equal Protection of the Laws in North Carolina*, Report of the North Carolina Advisory Committee to the United States Commission on Civil Rights, p. 220 (1962) states the nature of the state action.

> No restaurant, cafe, food or drink stand, hotel, motel, tourist home, or any other place where food or drink is prepared, handled, or served for pay, or where lodging accommodations are provided can operate without a permit from, and inspection by, the State board of health. G.S. 72-46 (1941). Such places are graded

A, B, or C and the grade card must be displayed in a conspicuous place. Violations incur fines or imprisonment. Threatened violations of the statute or of board regulations may be enjoined.

The inspectors' official State form (form 451, revised July 1958) allows 10 points (out of 90 in the category or 1,000 total for the test) if the toilet facilities are "adequate for each sex and race."

Petitioners submit that this explicit administrative encouragement of racial segregation in public eating establishments is sufficient to bring this case within the rule of *Peterson* v. *City of Greenville*, 373 U.S. 244, and *Lombard* v. *Louisiana*, 373 U.S. 267.

Respectfully submitted,

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